

#### REMARKS

Claims 1-19 and 21-26 will be pending after entry of the present amendments. Claim 3 is amended herein to correct a typographical error in the spelling of dairy. New Claims 22-26 are added herein. New Claims 22 and 24 recite wherein the material subjected to cooking comprises a fat to protein ratio of 0-200%. New Claim 23 is added to clarify that step (b) is performed. New Claim 25 clarifies that the cooking step modifies the casein whey interaction of the material. New Claim 26 recites that the length, temperature, and pH of the cooking step are selected such that the final product has a desired texture and physical properties. Support for the amendments can be found throughout the specification and claims as originally filed, for example paragraphs [0040], [0046], and [0050] of the specification as published. No new matter is added.

Claims 1-19 and 21 stand rejected under 35 U.S.C. § 103 as unpatentable over U.S. Patent No. 6,365,205 to Wahlgren. The Examiner also cited “Approximate pH of foods and Food Products, hereafter ‘pH’” and “US Dairy Export Council-Nutritional Information, hereafter USDEC” as evidence.

It is well settled that the Examiner “bears the initial burden of presenting a *prima facie* case of unpatentability...” *In re Sullivan*, 498 F.3d 1345 (Fed. Cir. 2007). Until the Examiner has established a *prima facie* case of obviousness, the Applicant need not present arguments or evidence of non-obviousness. To establish a *prima facie* case of obviousness, the Examiner must establish at least three elements. First, the prior art reference (or references when combined) must teach or suggest all of the claim limitations: “All words in a claim must be considered in judging the patentability of that claim against the prior art.” *In re Wilson*, 424 F.2d 1382, 165 U.S.P.Q. 494, 496 (CCPA 1970); (“the need to demonstrate the presence of all claim limitations in the prior art was not obviated [by KSR]”, *Abbott Labs. v. Sandoz, Inc.*, 2007 WL 1549498, \*4 (N.D. Ill. May 24, 2007)); *see also M.P.E.P. § 2143.03*. Second, there must be a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 U.S.P.Q. 375 (Fed. Cir. 1986); *Pharmastem Therapeutics v. Viacell, Inc.*, 491 F.3d 1342, 83 U.S.P.Q.2d 1289 (Fed. Cir. 2007); *see also M.P.E.P. § 2143.02*.

And finally, the Examiner must articulate some reason to modify or combine the cited references that renders the claim obvious. Merely establishing that the claimed elements can be

found in the prior art is not sufficient to establish a *prima facie* case of obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007) (emphasis added).

Applicants submit that Wahlgren fails to disclose the features of the claims. In the Final Office Action, the Examiner also found Wahlgren to disclose pasteurizing a dairy starting material (col. 2, lines 41-42). The Examiner also cited col. 4, lines 5-15 of Wahlgren to disclose a cooking step. Advisory Action, paragraph 4. Thus, the Examiner is citing the pasteurization step performed on either the dairy starting material prior to acidification in step A (col. 2, lines 13-46) or the pasteurization mentioned in column performed before or after the homogenization of step B, which is after acidification.

The pasteurization step performed before or after the homogenization in step C of Wahlgren is performed after the acidification in step. ("Preferably before and/or after the homogenization in step C, the product is kept at a temperature for a period of time sufficient to at least pasteurize it", col. 4, lines 9-11). Wahlgren fails to disclose pH adjustment besides the acidification in step A. Thus, when the pasteurization step of Wahlgren is performed after the acidification of step A, the combination fails to disclose "reducing the pH of *the cooked product* to a pH in the range of 4.5-7.5 *by addition of an acid or acidulant*" as recited in independent Claims 1 and 19.

The Examiner also cited the pasteurization step performed on the dairy starting material prior to acidification in step A (col. 2, lines 29-41). Under this interpretation, the pasteurization is performed on the dairy starting material. The starting material is subsequently acidified in step A, mixed with fresh acid-coagulated curd, and optionally homogenized in step C. Col. 1, lines 29-41. Applicants continue to respectfully disagree that the pasteurization step of Wahlgren is a cooking step as recited in the claims. The skilled artisan would recognize that the pasteurization step in Wahlgren and the cooking step, as recited in the claims, serve different purposes. A person of skill in the art would understand the pasteurization in Wahlgren to be a process specifically designed to slow microbial growth and thereby minimize possible health hazards arising from pathogenic microorganisms. The skilled artisan would also understand that pasteurization is designed to minimize chemical, physical and organoleptic changes to the treated milk and dairy products.

The cooking step as claimed, serves a different purpose from the pasteurization step of Wahlgren. The cooking step is used to modify the casein whey interaction. (See paragraph [0046] of the specification as published, "Preferred cooking times may be chosen on the basis that they are times sufficient for modification of the casein whey interaction. Casein-whey interactions provided by the cooking step provide increased strength of the texture of products produced from the casein whey mixture relative to uncooked controls or controls cooked at a pH of approximately 5.7."). The use of a higher pH in the cooking step than in the product leads to textural changes in the product.

Accordingly, a skilled artisan would recognize that the pasteurization of Wahlgren is not a cooking step as claimed, because cooking is designed to substantially modify the chemical, physical, and organoleptic properties of the dairy product, while the process of Wahlgren is intended to kill microorganisms without changing the nature of the product.

Thus, the pasteurization step of Wahlgren performed on the starting material prior to step A, fails to disclose or make obvious a cooking step as claimed in Claims 1 and 19.

For the reasons discussed above, Applicants submit that Wahlgren fails to disclose the features of Claims 1 and 19. Accordingly, Applicants respectfully request withdrawal of the rejection of Claims 1 and 19 and their dependents.

Applicants also disagree with the Examiner's finding of intended use in the Advisory Action. Applicants note that the pending claims are method claims and that the recited processes including the cooking step recites meaningful steps with meaningful physical results. In addition, Claim 31 is added to specify that the casein whey interaction is modified.

With respect to Claim 23, Wahlgren fails to disclose performing the pH adjustment of step (b) followed by step (c) subjecting the material with the desired pH to a cooking step; and step (d) reducing the pH of the cooked product to a pH in the range of 4.5-7.5 by addition of an acid or acidulant. Wahlgren only discloses modifying the pH in the acidification in step A. Wahlgren also fails to provide a reason to modify the pH as recited in step (b) prior to cooking and then modify the pH as recited in step (c) after the cooking step. Accordingly, Applicants respectfully request withdrawal of this rejection for at least this reason.

With respect to Claims 25 and 26, the pasteurization disclosed in Wahlgren fails to disclose a process “wherein the cooking step modifies the casein whey interaction of the material” as recited in Claim 25 or a process wherein “the length, temperature, and pH of the cooking step are selected such that the final product has a desired texture and physical properties” as recited in Claim 26. The process of Wahlgren doesn’t provide functional change. The skilled artisan would recognize that the pasteurization step in Wahlgren and the cooking step recited in Claims 25 and 26 serve different purposes. A person of skill in the art would understand the pasteurization in Wahlgren to be a process specifically designed to slow microbial growth and thereby minimize possible health hazards arising from pathogenic microorganisms. The skilled artisan would also understand that pasteurization is designed to minimize chemical, physical and organoleptic changes to the treated milk and dairy products. In contrast, Claim 25 recites that the cooking step modifies the casein whey interaction of the material and Claim 26 recites that the length, temperature, and pH of the cooking step are selected such that the final product has a desired texture and physical properties. There is no suggestion in Wahlgren to use the pasteurization step to perform any functional changes to the pasteurized material. Moreover, there is no reason to modify the process of Wahlgren and its pasteurization step to use a heat treatment step to denature the whey proteins because Wahlgren is not interested in changing the proteins – only in pasteurization that kills microorganisms.

Accordingly, Applicants submit that Claim 25 is not made obvious by Wahlgren because Wahlgren fails to disclose a step that modifies the casein whey interaction of the material as recited in Claim 25 or provide any reason to modify the process to perform such a feature.

Applicants also submit that Claim 26 is not made obvious by Wahlgren because Wahlgren fails to disclose a step that the length, temperature, and pH of the cooking step are selected such that the final product has a desired texture and physical properties or provide any reason to modify the process to perform such a feature.

No Disclaimers or Disavowals

Although the present communication includes alterations to the application or claims, or characterizations of claim scope or referenced art, Applicants are not conceding in this application that previously pending claims are not patentable over the cited references. Rather,

Application No.: 10/563,314  
Filing Date: August 1, 2006

any alterations or characterizations are being made to facilitate expeditious prosecution of this application. Applicants reserve the right to pursue at a later date any previously pending or other broader or narrower claims that capture any subject matter supported by the present disclosure, including subject matter found to be specifically disclaimed herein or by any prior prosecution. Accordingly, reviewers of this or any parent, child or related prosecution history shall not reasonably infer that Applicants have made any disclaimers or disavowals of any subject matter supported by the present application.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: Apr. 12, 2010

By: David Bull  
David K. Buckingham  
Registration No. 60,695  
Attorney of Record  
Customer No. 20,995  
(415) 954-4114

8644926  
030210